COURT OF APPEALS DECISION DATED AND FILED

August 18, 1998

**Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 96-3441

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE COMMITMENT OF PAUL WOZNIAK:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

PAUL WOZNIAK,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: PATRICIA D. MCMAHON and JEFFREY A. KREMERS, Judges.[1] *Affirmed.*

Before Fine, Schudson and Curley, JJ.

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[1] The Honorable Patricia D. McMahon presided over the trial and entered the order committing Wozniak; the Honorable Jeffrey A. Kremers presided over the *Machner* hearing and entered the order denying the motion for post-commitment relief.

PER CURIAM. Paul Wozniak appeals from the trial court order, following a jury trial, committing him to a secure mental health facility as a sexually violent person under Chapter 980, STATS., and from the order denying his post-commitment motions. Wozniak argues that trial counsel was ineffective for (1) failing to object to the use of information contained in presentence investigation (PSI) reports, and (2) failing to object to an expert's testimony about the sources on which the expert relied in formulating and applying the risk factor analysis he used in this case. We affirm.

I. BACKGROUND

On October 6, 1995, the State filed a Chapter 980 petition seeking the commitment of Wozniak as a sexually violent person. At the jury trial conducted in June 1996, testimony was provided by two witnesses: LaVonne Gilson, a Wisconsin Division of Corrections probation/parole agent, and Craig Monroe, Ph.D., a psychologist. In her testimony, Agent Gilson referred to and read from the PSI report she had prepared following Wozniak's 1985 sexual assault conviction, and from the PSI report prepared by a colleague in connection with an offense in 1974. In his testimony, Dr. Monroe referred to several of the sources utilized in formulating the risk factor analysis he applied to predict Wozniak's risk of re-offending.

Wozniak contends that counsel was ineffective for failing to object to certain aspects of the testimony of each witness. The trial court considered his claims at a post-commitment hearing and concluded that it did not "find anything about [trial counsel's] conduct … to be substandard." The trial court explained:

> [W]ith respect to the presentence report information I think in the manner in which it was used it was appropriate.… [E]ven if it were [violative of § 972.15, STATS.], … the

> State was simply suggesting that as a means of putting that information in, but they [sic] had alternative methods, and the court ruled that they [sic] could put it in this way.
>
> …[T]he information was readily obtainable from another source or sources, and therefore I don't see any prejudice to Mr. Wozniak by [counsel's] failure to object to the use of the presentence report in a more extensive fashion ….
>
> With respect to the risk factor analysis I think the State is quite correct….
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> … [W]hat we have here is an expert who has been educated as to a particular method of analyzing various data with respect to recidivism rates for sex offenders, and he's put that information to use in his analysis and diagnosis and examination of the respondent and reached certain conclusions, which he can testify to, and depending on the nature of the proceeding and the strategic decision of the attorneys, he may or may not be cross examined in great detail about that, but I don't see anything in this transcript that would have allowed [counsel] to successfully preclude Dr. Monroe from testifying in the manner that he did.

II. ANALYSIS

Review of an ineffective assistance of counsel claim involves a mixed question of law and fact. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The trial court's factual findings from the post-commitment motion will not be disturbed unless clearly erroneous. *See* ***id.*** The legal conclusions of whether trial counsel's performance was deficient and prejudicial based on those factual findings, however, are questions of law reviewed independently by this court. *See* ***id.*** at 128, 449 N.W.2d at 848.

To establish that his trial counsel provided ineffective assistance, Wozniak must establish both that counsel's performance was deficient and that counsel's deficient performance was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Ludwig***, 124 Wis.2d 600, 607, 369 N.W.2d

722, 725 (1985). A court need not address both components if a defendant fails to establish either one. *See* ***Strickland***, 466 U.S. at 697.

Prejudice occurs when counsel's deficient performance is "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. To demonstrate prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *See* ***State v. Johnson***, 153 Wis.2d at 129, 449 N.W.2d at 848. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *See* ***id.*** We conclude that Wozniak has failed to establish that counsel's alleged errors were prejudicial.

A. The PSI Reports

Wozniak offers little if any challenge to Agent Gilson's "considerable … testimony going over [his] criminal record," based on the PSIs, but argues that counsel should have objected to her "also giving detailed information about [him] from the various PSI's she had access to." He elaborates:

> This information … included the defendant's response to various charges against him, including his explanation, denial, etcetera. It included various reports from the prisons about his care and treatment. The testimony also included the opinions and conclusions of Ms. Gilson and others as to the defendant's adjustments while in prison, his reactions to the charges against him, their own feelings as [to] whether he received appropriate treatment and in other ways the agents' summaries and impressions.

Later in his brief, Wozniak also challenges Agent Gilson's references to "his family history and the various agents' impressions, opinions and conclusions concerning [him] and his past conduct, history, etcetera."

Wozniak argues that admission of the PSIs was improper because their use violated the confidentiality rule of § 972.15(4), STATS.,[2] and because they "contained highly prejudicial information that was not relevant or probative of the issues before the court and the jury." Wozniak fails, however, to identify a single, specific piece of information from any of the PSIs that was not relevant or probative, or that was unfairly prejudicial.

While Wozniak claims that "a substantial portion of [the PSI information] was not relevant or material, but was highly prejudicial," neither in his briefs nor at oral argument before this court did he identify any such "portion," or explain how it was prejudicial. While he contends that his "response to the charges against him in the past, his various family history, etcetera, was not relevant," but that "it certainly was very prejudicial," he fails to explain why such apparently relevant information should have been excluded. While he refers to "[t]he extraneous material in the PSI," he fails to identify it. And while he asserts that "various opinions of the PSI writers about [his] past and his treatment or lack thereof" was "personal" and "non-relevant," he makes no attempt to explain why. Indeed, in an apparently contradictory argument, Wozniak asserts: "As to the evidence that was submitted to the court from the PSI's, it is certainly possible that the State could have proved some of that evidence without the use of the PSI's. In fact, they [sic] should have."

In ***State v. Zanelli***, 212 Wis.2d 358, 569 N.W.2d 301 (Ct. App. 1997), this court explained that although the "care and treatment" exception of

[2] Section 972.15(4), STATS., provides: "After sentencing, unless otherwise authorized under sub. (5) [relating to "use … for correctional programming, parole consideration or care and treatment"] or ordered by the court, the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court."

§ 972.15(5), STATS., would not allow for the introduction of PSI information in a Chapter 980 trial, the discretionary authority of a trial court, pursuant to the "specific authorization of the court" under § 972.15(4), STATS., could do so. ***Id.*** at 377-78, 569 N.W.2d at 309. We explained:

> [T]he court may apply [§ 972.15(4), STATS.] in its discretion to open the PSI to the State's psychologists who are called upon by ch. 980, STATS., to evaluate whether a person is a sexually violent person in need of treatment. Because the PSI may contain information highly relevant to this inquiry, we conclude that the trial court has the discretion to release it for this purpose. This approach permits the trial court to weigh countervailing factors. It may decide whether the PSI in fact contains relevant evidence, whether that evidence is available from other sources, weigh its probative value against the potential for unfair prejudice and consider all other relevant factors of a particular case. *A similar decision should be made with respect to use of PSI evidence at trial*. This case-by-case determination is therefore governed by the trial court's discretionary powers as authorized by § 972.15(4).

Id. at 378, 569 N.W.2d at 309 (emphasis added).

As noted, Wozniak has not directed our attention to any specific piece of information that *would have been excluded had counsel objected*. Indeed, contrary to his general assertions, the very information to which he takes exception – family history, response to charges, treatment or lack thereof – ordinarily would be relevant, if not absolutely critical, to the issues at a Chapter 980 trial.

Although dealing with records referred to not as PSIs, but rather, as "probation and parole files," the recent decision in ***State v. Keith***, 216 Wis.2d 61, 573 N.W.2d 888 (Ct. App. 1997), bolsters our view. Concluding that such records were admissible as public records under § 908.03(8), STATS., this court declared:

> Moreover, since ch. 980 is a civil proceeding, the records may be used to establish factual findings made during investigations, as well as activities or observations made by [Department of Corrections] personnel. The only foundation required to introduce DOC records is that they be identified by a competent witness.

Id. at 77, 573 N.W.2d at 896 (citations omitted).

Thus, failing to specify any irrelevant or unfairly prejudicial information in the PSIs, and failing to identify any information that would have been excluded had trial counsel objected, Wozniak utterly fails to identify any objection trial counsel could have made that would have been sustained, or any prejudice that could have arisen from the admission of information that, Wozniak acknowledges, "the State could have proved … without the use of the PSI's."[3] Thus, Wozniak has not established that counsel's failure to object to the PSI information was prejudicial.

B. Expert Testimony

Wozniak argues that counsel was ineffective for failing to object to Dr. Monroe's "hearsay testimony that was highly prejudicial," consisting of "various findings and evidence from [research] articles in support of his conclusions." He contends:

> The end result was that Dr. Monroe was allowed to put into evidence numerous and various criteria upon which he relied as the basis for indicating that the defendant was a sexual predator. His various risk factor analysis [sic] were gone through point-by-point and he testified as to the particular articles and information he relied upon to come to his conclusions and criteria he saw as to the defendant. All of this information was inadmissible hearsay, subject to

[3] Wozniak further undercuts his own argument when, in his reply brief, he concedes that "the State could easily have resorted to proving its case without using so much extraneous material which should not have been admitted."

> the possibility that the information could be allowed if the court gave appropriate limiting instructions or limited the evidence given to the jury. This was never done.

Wozniak concedes, however, that "[s]ome of this literature could have been admitted after various objections with appropriate precautionary instructions." In fact, he specifies only one example of what he deems improper evidence – a portion of Dr. Monroe's testimony in which he referred to one of the studies on which his risk factor analysis of Wozniak was based:[4]

> The second factor was that there be a history of prior sexual assaults. And what they're looking for there, the criteria is that there is more than one sexual assault. I previously testified, and I'm sure you heard other testimony, that Mr. Wozniak had multiple known sex offenses. Now, when I say known, what we also know about the research literature is that the number of times that somebody's apprehended, that somebody complains, files a charge that results in a conviction is a very low percentage of the actual assaults that have occurred. One research study back in the '80s granted offenders complete anonymity and asked them how many offenses have you committed, and the average age of a child molester in that study was in their thirties and the number of – average of victims was 286.[5]

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[4] At oral argument, Wozniak acknowledged that he was not challenging any other specific portion of Dr. Monroe's testimony.

[5] To assist the able lawyers who litigated this appeal, we note serious deficiencies in their briefs on this issue. Appellant's counsel, with only marginal accuracy, referred to this as: "the testimony by Dr. Monroe that one article indicated that for every conviction a pedophile has there are over two hundred eighty-six other sexual assault offenses that have occurred." He never quoted the testimony, and never provided a record reference for it. *See* RULE 809.19(1)(e), STATS. On that basis alone, we could have declined to consider appellant's argument. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (court need not consider arguments inadequately briefed or unsupported by citations to the record). Respondent's counsel did no better. She failed to cite or quote the testimony, *and failed to offer any argument specifically responding* to appellant's claim. On this basis alone, we could have accepted appellant's position. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

Wozniak argues that with this testimony, "the jury was presented with hearsay evidence that someone such as the defendant may have committed literally thousands of sexual assaults that have not been found out or charged." He asks, "How can a jury not be affected by this testimony?" Further, in his reply brief, Wozniak maintains:

> *What could the jury have been thinking?* Here we have Wozniak, who is in 70's. There is no dispute that he has had a long history of sexually related offenses. Could any jury, having heard that one study showed that child molesters in their 30's have had at least 286 victims, not conclude that Wozniak, considering his age, probably assaulted in excess of 600 victims.

Wozniak's argument is flawed in several respects. First, he offers nothing to counter the trial court's conclusion that, under § 907.03, STATS., Dr. Monroe's testimony was admissible as reflecting "data … upon which an expert bases an opinion or inference." Second, he fails to acknowledge that, under § 907.05, STATS., Dr. Monroe was allowed to "testify in terms of opinion or inference and give the reasons therefor." In short, if such a study formed part of the basis for Dr. Monroe's opinion, the study was relevant. Whether the study was accurate or worthy of Dr. Monroe's reliance was a fair area for cross-examination,[6] but Wozniak has offered no authority to establish that Dr. Monroe's testimony was improper.

Moreover, even if an objection could have led to a culling out of potentially confusing data or inadmissible information, *see* ***State v. Weber***, 174 Wis.2d 98, 106-08, 496 N.W.2d 762, 766-67 (Ct. App. 1993), Wozniak offers

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[6] Indeed, § 907.05, STATS., also provides that "[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination."

nothing to establish prejudice. Aside from asking, "What could the jury have been thinking?", Wozniak fails to explain how this brief reference, in the midst of Dr. Monroe's extensive testimony explaining many of the underlying sources for his opinion, produced an unreliable result in his trial. Indeed, Wozniak acknowledges that his case is comparable to one "where there is overwhelming evidence of guilt." He concedes:

> It does not take a rocket scientist to figure out that Wozniak has a long history of sexually related offenses. Further, the State could easily have resorted to proving its case without using so much extraneous material which should not have been admitted.

Thus, Wozniak offers absolutely nothing to refute the State's contention that "any possible error" in the admission of Dr. Monroe's risk factor testimony was harmless. As the State explains:

> [T]he evidence supporting Wozniak's ch. 980 commitment was overwhelming. Although Dr. Monroe's risk factor testimony properly assisted the jury in understanding that Wozniak is substantially likely to commit other sexually violent offenses, the jury surely would have reached that conclusion even without that testimony. Uncontradicted evidence showed that Wozniak is a diagnosed pedophile with a record of numerous child sexual assault convictions dating back to 1937 and who has rejected or failed all offered sex offender treatment. Substantial probability of reoffense is the only possible conclusion.

We agree. Accordingly, we conclude that, on this issue also, Wozniak has failed to establish prejudice.

By the Court.—Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.